No. 90-479

In The

Supreme Court of the United States

October Term, 1990

J. CASPER HEIMANN; OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE and JOHNANN ADEE, his wife; HOWARD W. ROBERTSON and PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for SHARON ADEE and DOWLEN ADEE; J. CASPER HEIMANN, as Trustee for RANDALL LYNN HEIMANN, deceased, JAY DEE HEIMANN, GENE ALVIN HEIMANN and RUSSELL GARY HEIMANN; PAULINE ROBERTSON, as Trustee for VAN HOWARD ROBERTSON; DEANA SHUGART, a married woman dealing in her sole and separate estate; and JOHNANN ADEE, in her capacity as Personal Representative of THE ESTATE OF FRED P. HEIMANN, deceased,

Petitioners,

v.

AMOCO PRODUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Page

CASES

TABLE OF CASES AND AUTHORITIES – Continued

INTRODUCTION

This Reply Brief addresses only the issue of the timeliness of the Petition for Writ of Certiorari, which is an issue raised for the first time in the Brief of Respondent in Opposition.

POINT I

THE TIMELY FILING OF A PETITION FOR REHEARING TOLLS THE TIME FOR FILING THE PETITION FOR WRIT OF CERTIORARI UNTIL THE PETITION IS DENIED.

The dispositive point is one which is not questioned: The timely filing of a petition for rehearing tolls the time for filing the petition for writ of certiorari until the petition is denied. This has been the consistent practice of this Court for nearly fifty years. *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). Since 1980, it has been reflected in this Court's rules. S.Ct.R. 13.4. *See generally*, R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, § 6.3, p. 313 (6th ed. 1986). The reason for the rule is that a timely petition for rehearing,

> operates to suspend the finality of the court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties.

Missouri v. Jenkins, supra, 110 S.Ct. at 1660 (quoting *Department of Banking of Nebraska v. Pink*, 317 U.S. 264, 266 (1942)).

The operative dates and events are as follows:

April 6, 1990	Tenth Circuit issued its original Opinion (attached to the Brief of Respondent as Appendix A).
April 20, 1990	Petitioners timely filed their "Petition for Rehearing and Suggestion for Rehearing En Banc" (attached to this Reply Brief as Appendix I).
May 24, 1990	Tenth Circuit filed an amended Opinion and an Order reflecting that "[i]n all other respects, the petition for rehearing is denied" (attached to the Petition for Writ of Certiorari as Appendices A and G, respectively).
June 7, 1990	Petitioners filed a "Petition for Rehearing" from the amended Opinion entered on May 24, 1990 (attached hereto as Appendix II).
June 12, 1990	Tenth Circuit entered its Order denying Petitioners' "second petition for rehearing" (attached to the Petition as Appendix H).
Sept. 10, 1990	Petitioners filed their Petition for Writ of Certiorari with this Court.

The finality of the Court's original Opinion was suspended by the timely filing of Petitioner's first Petition for Rehearing on April 20, 1990. When the Tenth Circuit entered its amended Opinion on May 24, 1990, that amended Opinion necessarily superseded and replaced the original Opinion and became the operative Opinion. Petitioners filed a timely Petition for Rehearing from that amended Opinion on June 7, 1990, so the finality of that amended Opinion was thereby suspended. That Petition was denied on June 12, 1990. Petitioners then filed their

Petition for Writ of Certiorari with this Court on September 10, 1990, ninety days later. Therefore, the Petition is timely.

Respondent does not question the operative dates or events. However, it argues that this analysis does not apply for these reasons: (1) the time is not tolled unless the amended Opinion or judgment reflects a substantive change rather than a formal correction, (2) a second petition for rehearing is not authorized and can therefore be ignored, and (3) the second Petition was untimely since the prospectivity issue could have been raised in the first Petition. None of these arguments has any merit.

POINT II

A PETITION FOR REHEARING WHICH SEEKS A SUBSTANTIVE CHANGE IN THE OPINION TOLLS THE TIME FOR FILING REGARDLESS OF WHETHER THE COURT MAKES ANY SUCH CHANGE.

First, Respondent argues that the time for filing a petition for writ of certiorari is measured from the original judgment unless the amended judgment changes matters of substance or resolves an ambiguity in the original judgment, but not if it merely restates what it had already decided, citing *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), and *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952). However, neither of those cases involved the effect of a petition for rehearing on the finality of the judgment. In neither case was a petition for rehearing filed. *See, United States v. Adams*, 383 U.S. 39, 41-42 (1966) (applying the tolling rule and distinguishing *Minneapolis-Honeywell* because "it did not involve a timely motion to amend the judgment"). *See also, Supreme Court Practice, supra,* at

§ 6.4, pp. 314-315. Because this case involves the effect of a petition for rehearing on the time limitation for filing a petition for writ of certiorari, those cases are inapplicable.

Just this year, this Court made it clear that the tolling rule *does* apply in circumstances such as this one.

> The [tolling] practice does not extend to petitions for rehearing seeking only to correct a formal defect in the judgment or opinion of the lower court. In such cases, of which *Pink* was one, "no . . . alteration of the rights [is] asked, and the finality of the court's first order [is] never suspended." [Citing *Pink, supra*].

Missouri v. Jenkins, supra, 110 S.Ct. at 1660, n. 13.

The application of this exception depends, however, not on how the Court of Appeals ruled on the petition, but on what the petition asked the Court to do. *Id.; Federal Communications Commission v. League of Women Voters of California,* 468 U.S. 364, 373, n. 10 (1984); *United States v. Crescent Amusement Co.,* 323 U.S. 173, 177 (1944). If the petition asks for only a formal correction not affecting the rights of the parties, then the finality is not suspended. Accordingly, the party knows at the time the petition for rehearing is filed whether his time for filing the petition for certiorari is tolled, depending on the relief sought in his petition for rehearing.

If, as Respondent seems to suggest, the tolling depended on whether the Court actually made any substantive changes in the opinion, then two results would obtain: (1) the party would not know whether his time was tolled until the court ruled on his petition for rehearing, which ruling could take more than 90 days, and (2) in the vast majority of cases, there would be no tolling since

courts of appeals rarely make substantive changes as a result of petitions for rehearing but, rather, simply deny them. Both of these results conflict squarely with the purpose and language of S.Ct.R. 13.4, which is to allow tolling for a petition for rehearing until "the date of the denial of the petition for rehearing or the entry of the subsequent judgment." Therefore, as long as the petition for rehearing *seeks* substantive changes in the opinion, then it is a petition for rehearing in form and substance, and S.Ct.R. 13.4 applies to toll the time for filing the petition for writ of certiorari.

In this case, both the first and the second Petitions for Rehearing are attached to this Reply Brief. They demonstrate, and the Respondent does not deny, that in both Petitions, Petitioners sought substantive changes in the Opinions. The first one (Appendix I to this Reply Brief) was aimed at numerous defects in the analysis which led the Court to its conclusions, and sought to alter the Court's Opinion on the issues presented. In response to that Petition, the Court made substantive alterations in its analysis by reducing its reliance upon the New Mexico Statutory Unitization Act, §§ 70-7-1, et seq., NMSA 1978, and attempting to distinguish the case of *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962), but its conclusion was unaltered. (Appendix A to the Petition).

After the Court had refined and finally arrived at its decision on the merits, in which it overruled one of its prior decisions, in the second Petition for Rehearing, Petitioners sought to have the Court's amended Opinion applied prospectively. (Appendix II to this Reply Brief). That Petition was simply denied. (Appendix H to the

Petition). However, it is absolutely clear that both Petitions sought major, substantive changes and the affirmance of the judgment of the District Court. Neither of them sought only "formal" changes unrelated to the rights of the parties.

Moreover, the second Petition for Rehearing rendered non-final all the issues in the case, not merely the issue of prospectivity. *See, Washington v. Confederated Tribes of Colville,* 447 U.S. 146 (1980) (in an appeal from the decision of a three-judge court, the post-trial motion for partial new trial rendered non-final and reviewable all issues, not merely those which were the subject of the motion). *See also, Clarke v. United States,* 898 F.2d 162 (D.C.Cir. 1990) (applying the same rule in connection with certiorari).

Therefore, both of these Petitions for Rehearing have the effect of tolling the time for filing the Petition for Writ of Certiorari.

POINT III

THE COURT OF APPEALS HAD THE AUTHORITY TO ENTERTAIN THE SECOND PETITION FOR REHEARING.

Secondly, Respondent argues that the second Petition should be disregarded because a second or successive petition for rehearing is not authorized, citing *National Latex Products Co. v. Sun Rubber Co.,* 276 F.2d 167 (6th Cir. 1960). In that case, the petitioner filed a second Petition for Rehearing which raised the same issues contained in the first Petition. In the case at bar, the second Petition (1) was filed after the Court amended its Opinion, (2) was

directed at the amended Opinion, and (3) was not repetitive of the first Petition. Therefore, *National Latex* is distinguishable.

Moreover, a second petition for rehearing is authorized. This Court has not only entertained second petitions for rehearing but has granted them. *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *United States v. Ohio Power Co.*, 353 U.S. 98 (1957); *Cahill v. New York, N.H. & H.R. Co.*, 351 U.S. 183 (1956). Likewise, the practice of the federal courts of appeals is to hear second petitions for rehearing, and they have granted them as well. *See e.g., Clarke v. United States, supra; Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir. 1990). Indeed, in *Clarke*, the Court held that the motion to vacate the order denying the first petition for rehearing (which motion was treated as a second petition for rehearing) effectively tolled the time for filing a petition for certiorari in this Court.

Therefore, Petitioners' second Petition for Rehearing, which was timely filed within fourteen days of the amended Opinion of May 24, 1990, had the effect of suspending the finality of that amended Opinion until June 12, 1990, when that Petition was denied.

POINT IV

THE SECOND PETITION COULD NOT HAVE BEEN FILED EARLIER AND, ALTERNATIVELY, EVEN AN UNTIMELY PETITION FOR REHEARING TOLLS THE FILING TIME WHERE THE LOWER COURT ACCEPTS IT FOR FILING, CONSIDERS IT, AND DENIES IT.

Finally, the second Petition for Rehearing cannot be ignored on the ground that the petitioner's position on

prospectivity could have been raised in the first Petition for Rehearing. It could not have been raised in the first Petition for Rehearing because the analysis and Opinion of the court on the merits were not final until May 24, 1990, when it issued its amended Opinion. Only then could the issue of prospectivity of that amended Opinion be raised and addressed. Whether a different case might be presented where successive petitions for rehearing are directed at the same opinion is an issue not presented by these facts and need not be decided here.

Moreover, Respondent cites no authority for the proposition that a second petition for rehearing which raises an issue that could have been raised in the first petition for rehearing but was not raised therein is void. However, even assuming arguendo that the issue of prospectivity could have been raised in the first Petition, that would make the second Petition for Rehearing at best merely untimely, not void. The rule on untimely petitions for rehearing was stated in *Bowman v. Loperna*, 311 U.S. 262 (1940), as follows:

> [T]he filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court *allows the filing and, after considering the merits, denies the petition,* and the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.

Id. at 266. (Emphasis added).

See also, Pfister v. Northern Illinois Finance Corp., 317 U.S. 144 (1942). *See generally, Supreme Court Practice, supra,* at § 6.3, p. 313.

Here, the Tenth Circuit's Order of June 12, 1990 (Appendix H to the Petition) provided, in part, as follows:

> The court has for consideration in the captioned cases:
>
> 1. Appellees' second petition for rehearing;
>
> . . . .
>
> Upon consideration whereof, the court denies appellees' second petition for rehearing.

If the Tenth Circuit had felt that the second Petition for Rehearing was untimely filed, it would not have had that Petition before it "for consideration." By considering it and denying it "upon consideration whereof," the Court brought the second Petition within the rule of *Bowman v. Loperna, supra.* As in *Missouri v. Jenkins, supra,* the treatment afforded the petition for rehearing by the lower court should be given deference in applying the rules on the time for filing the petition for certiorari.

Accordingly, even assuming arguendo that the second Petition was untimely, it was nevertheless accepted for filing, considered, and denied and, therefore, had the effect of tolling the time for filing the Petition for Certiorari.

CONCLUSION

Accordingly, the Petition for Writ of Certiorari should not be dismissed as untimely. For the reasons stated therein, it should be granted.

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 88-2070, 88-2072,
88-2255, 88-2355 (Consolidated)

AMOCO PRODUCTION COMPANY,

Plaintiff-Appellant and Cross-Appellee,

vs.

J. CASPER HEIMANN and OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE and JOHNANN ADEE, his wife; HOWARD W. ROBERTSON and PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for Sharon Adee and Dowlen Adee; J. CASPER HEIMANN, as Trustee for Randall Lynn Heimann, deceased; Jay Dee Heimann, Gene Alvin Heimann and Russell Gary Heimann, PAULINE ROBERTSON, as Trustee for Van Howard Robertson; DEANA SHUGART, a married woman, dealing in her sole and separate estate; JOHNANN ADEE, as Personal Representative of the ESTATE OF FRED P. HEIMANN, Deceased,

Defendants-Appellees and Cross-Appellants.

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Filed April 20, 1990)

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Pursuant to Rules 35 & 40, Fed.R.App.P., and 10th Cir. Rules 35 & 40, all of the above-named Defendant-Appellees and Cross-Appellants (hereinafter "the Heimanns") hereby petition for rehearing and suggest that the rehearing be en banc.

CERTIFICATION PURSUANT TO 10TH CIR. R. 35.2.2

I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the United States Supreme Court and United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Amoco Production Co. v. Jacobs, 746 F.2d 1394 (10th Cir. 1984);

Oklahoma Packing Co. v. Oklahoma Gas & Electric, Co., 309 U.S. 4 (1940);

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908)

Granfinanciera, S.A., v. Nordberg, ___ U.S. ___, 109 S.Ct. 2782 (1989);

Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442, 458 (1977).

I express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

> Where a federal jury awarded damages for breach of an implied covenant under a lease, did the panel decision deprive the litigants of their right to a jury trial under the Seventh Amendment to the United States Constitution by vacating the jury award and giving collateral estoppel effect to findings made by a state

agency which, under state law, acts only in an administrative, not a judicial, capacity?

/s/ Steven L. Tucker
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Background

Plaintiff-Appellant and Cross-Appellee (hereinafter "Amoco") brought this action seeking a declaratory judgment to the effect that the Heimanns' mineral lands were legally included in a carbon dioxide gas unit in northeastern New Mexico, known as the Bravo Dome Carbon Dioxide Gas Unit. The Heimanns own lands on which Amoco has mineral leases and, under the terms of those leases, Amoco has the right to unitize those lands with other lands, subject to the express and implied obligations under the leases. The Heimanns counterclaimed against Amoco alleging, among other things, that Amoco had breached its implied obligation of good faith under the leases and seeking montary [sic] damages caused by the breaches and injunctive relief requiring Amoco to exclude the Heimanns' lands from the unit.

The Heimanns demanded a jury trial on all issues triable to a jury. A jury trial was held and the jury returned a verdict in favor of the Heimanns on the good faith issue awarding compensatory damages of $3,500,000 and punitive damages of $500,000. After that verdict had been returned, the trial court independently considered the equitable issues and entered detailed findings of fact and conclusions of law in which it also found that Amoco had breached its duty of good faith to the Heimanns.

Appropriate judgments were entered awarding damages and ordering that the Heimanns lands be taken out of the Bravo Dome unit.

Prior to trial Amoco had argued that the issue of its good faith was conclusively established in its favor by certain findings made by the New Mexico Oil Conservation Commission ("OCC") in an administrative proceeding held in 1980. On the basis of this Court's decision in *Jacobs*, the trial court rejected that contention and held that the OCC did not and could not decide any issues as between Amoco and the Heimanns.

On appeal, the panel of this Court overruled *Jacobs*, held that the OCC's findings were conclusive as between Amoco and the Heimanns on the issue of whether Amoco breached its duty of good faith to the Heimanns under their leases, and vacated the judgment entered on the jury verdict as well as the judgment entered by the court on the equitable issues.

POINT I

THE PANEL DECISION CONFLICTS WITH THE *OKLAHOMA PACKING* AND *PRENTIS* DECISIONS BY FAILING TO APPLY NEW MEXICO LAW ON THE ISSUE OF THE OCC'S ADMINISTRATIVE CAPACITY.

The panel decision correctly holds that in order for collateral estoppel to apply to a decision of an administrative agency, the agency must, among other things, be acting in a "judicial capacity." *See, University of Tennessee v. Elliott*, 478 U.S. 788, 797-799 (1986); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). The full statement of the rule, stated in *Elliott*, is as follows:

> [W]hen a state agency "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *Utah Construction & Mining Co., supra,* 384 U.S., at 422, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.

Elliott, supra, at 799.

Thus, there are at least two requirements for the application of collateral estoppel to decisions of administrative agencies: (1) the agency must be acting in a "judicial capacity" and (2) the parties must have had an "adequate opportunity to litigate" the issues adjudicated by the agency.

The New Mexico Supreme Court has definitively ruled that the OCC acts only in a legislative or "administrative" capacity when it acts to prevent waste and to protect correlative rights, not in a "judicial" capacity. Therefore, collateral estoppel cannot apply to the rulings of the OCC. However, the panel failed to apply New Mexico law on this issue.

In *Continental Oil Co. v. Oil Conservation Commission,* 70 N.M. 310, 373 P.2d 809 (1962), the Supreme Court conducted an extensive review of the statutes applicable to the jurisdiction of the OCC and its powers and duties in preventing waste and protecting correlative rights. In that case, the OCC had prorated a gas pool and had established a formula for allocating production from that pool. Later, upon application of one of the producers, the OCC held a hearing and then changed the formula. Other producers sought a rehearing and, after a rehearing, the

OCC entered a slightly modified order. The statute at that time allowed for a de novo appeal to the district court, and several producers appealed.

On appeal, the district court (1) prohibited the OCC from participating as a party and (2) allowed new evidence to be introduced on the issues. The Supreme Court said that "the function of the commission, i.e., whether administrative or quasi-judicial, is all-important" to both of those issues. *Id.*, 373 P.2d at 817. It held as follows:

> Our legislature has explicitly defined both "waste" and "correlative rights" and placed upon the commission the duty of preventing one and protecting the other. . . . Although subservient to the prevention of waste and perhaps to the practicalities of the situation, the protection of correlative rights must depend upon the commission's findings as to the extent and limitations of the right. This the commission is required to do under the legislative mandate. *As such, it is acting in an administrative capacity in following legislative directions, and not in a judicial or quasi-judicial capacity.*

Id., 373 P.2d at 818 (Emphasis added).

The Court went on to state that the OCC represents only the "public interest" when it prevents waste and protects correlative rights. That is, its legislative mandate is to prevent waste of New Mexico's natural resources and, when it acts within its jurisdiction to do so, such as in prorating allowable production, it must insure that the correlative rights of interest owners are kept in balance. However, the Court made clear that the OCC acts solely to protect the public interest; it does not adjudicate anything. If it did so,

> grave constitutional problems would arise. For the same reason, it must follow that, just as the commission cannot perform a judicial function, neither can the court perform an administrative one.

Id., 373 P.2d at 819. Accordingly, the Court held the OCC to be a necessary party to an appeal from its own order and the provision allowing for de novo appeals of that order to the district court to be contrary to the separation of powers provision of the New Mexico Constitution. *Id.*

Some 13 years later, the Supreme Court characterized the *Continental Oil* decision as "the primary oil and gas decision in New Mexico." *Grace v. Oil Conservation Commission*, 87 N.M. 205, 531 P.2d 939, 946 (1975). Yet, the panel simply overlooked it and failed to apply its clear and unequivocal holding that the OCC acts in a legislative or administrative capacity in preventing waste and protecting correlative rights, not in a judicial capacity.

The panel decision thus conflicts with *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940). In that case, the issue was whether a 1930 decision by the Oklahoma Supreme Court was res judicata. That decision had been entered on an appeal from the Oklahoma Corporation Commission in a rate proceeding. The Supreme Court of the United States held that (1) state law determined whether the decision was legislative (administrative) or judicial (2) another decision of the Oklahoma Supreme Court had determined that both administrative proceedings and appellate proceedings in rate cases constituted legislative, not judicial proceedings, and (3) being a legislative proceeding, res judicata did not apply. The panel decision conflicts with *Oklahoma Gas* by failing

to apply the law of New Mexico, specifically the holding in the *Continental Oil* case, on the issue of whether the proceedings before the OCC were legislative or judicial.

The panel decision also conflicts with *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). In that case, the Court held that proceedings are legislative or judicial, not according to the body which conducts them, but based upon the character of the proceedings. Moreover, where the administrative proceedings are legislative in nature, their character does not change upon an appeal through the courts.

> So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. . . . And all that we have said would be *equally true if an appeal had been taken to the supreme court of appeals and it had confirmed the rate. Its action in doing so would not have been judicial,* although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called.

Id. at 227. (Emphasis added).

Therefore, by holding that the appeals of the OCC decision to the state district court and Supreme Court changes the legislative character of the proceedings, the panel decision conflicts with both *Prentis* and *Oklahoma Gas*.

Finally, the panel decision also failed to apply clear New Mexico law in its analysis of New Mexico statutes

on the jurisdiction of the OCC, and the result was a conclusion which has no support in New Mexico law and is directly contrary to two decisions of the New Mexico Supreme Court.

No statute gives the OCC the power, the authority, or the duty to approve or disapprove a voluntary unitization project such as this. Nevertheless, the Heimanns have never questioned the jurisdiction of the OCC and bring no collateral attack against its order. The point is, assuming that the OCC had jurisdiction to "approve" the Bravo Dome unit, that approval order can represent nothing more than a determination by a state agency of New Mexico's *public interest*; it can represent no adjudication of any issue in this lawsuit and therefore, can have no collateral estoppel effect here.

The panel decision cites three statutes as defining the authority of the OCC to approve this project: §§ 70-2-11, 70-2-33(H), and 70-7-6(B), NMSA 1978. The last of these is quoted on page 15 of the panel decision and is given major emphasis. However, that statute is contained in the Statutory Unitization Act, §§ 70-7-1, et seq., NMSA 1978. On the appeal from the OCC decision at issue here, the New Mexico Supreme Court held, with the agreement of Amoco, that the Statutory Unitization Act does not apply to the Bravo Dome Unit.

> New Mexico's Statutory Unitization Act, NMSA 1978, Section 70-7-1 through 70-7-21 (Unitization Act), is an example of forced or compulsory unitization. However, the Unitization Act does not apply to the situation presented in this appeal. It applies to secondary and tertiary recovery projects, not to *voluntary exploratory*

> *units* for primary production such as that proposed in the Bravo Dome Unit. § 70-7-1.

Casados v. Oil Conservation Commission, No. 14,359 (N.M.S.Ct. unpublished) attached to the Brief of the Appellant as Attachment 1, at page 9. (Emphasis by the Court).

The Court went on to hold that in any proceedings for the approval of voluntary unitization projects, such as the Bravo Dome Unit, there is "no conflict" to resolve since the interest of the parties are protected by their leases. *Id.* at 9-10. Leases must, of course, be enforced in a judicial forum.

The second statute cited by the panel is § 70-2-33(H), NMSA 1978, which merely defines "correlative rights." As such, it confers no jurisdiction and creates no duty or authority.

The final statute cited is § 70-2-11, NMSA 1978, a general statute which does nothing more than give the OCC the power and duty to prevent waste and to protect correlative rights. However, the jurisdiction of the OCC to prevent waste and to protect correlative rights was extensively examined in *Continental Oil* and was held not to extend to adjudication of private rights. The panel decision disregards *Continental Oil* and forcibly stretches this statute to include adjudications.

The panel decisions also overlooked § 70-2-29, NMSA 1978, which is a clear expression by the Legislature that nothing done by the OCC under the authority of the Oil and Gas Act, § 70-2-1, et seq., NMSA 1978, is intended to

impair or abridge any person's right to go to court and sue for damages. It provides,

> Nothing in this act contained or authorized, and no suit by or against the commission or the division, . . . shall impair or abridge or delay any cause of action for damages which any person may have or assert against any person violating any statute of the state with respect to conservation of oil and gas, or any provision of this act, or any rule, regulation or order issued thereunder. Any person so damaged by the violation may sue for and recover such damages as he may be entitled to receive. . . .

The panel simply reached over clear New Mexico authority on this subject and collected distinguishable authority from other jurisdictions. *University of Tennessee v. Elliott, supra; Kremer v. Chemical Construction Corp.*, 456 U.S. 485 (1982); and *Long v. Laramie County Community College District*, 840 F.2d 743 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 73 (1988), were all employment discrimination cases where the agency had the statutory duty of adjudicating and validity of the specific employee's discrimination claim based on individual-specific evidence. That kind of administrative action was so obviously "judicial" rather than "legislative" that the point did not even merit discussion. The discussion in those cases about the opportunity of the parties to litigate the issue before the agency applied to the *second* element stated in the *Elliott* test, which is quoted on page 4 of this Petition, not on whether the body acts in a "judicial capacity."

By overlooking clear New Mexico precedent establishing that the OCC was acting in a legislative, not a judicial, capacity, and reaching out to inapplicable

authority, the panel decision conflicts with prior decisions of the Supreme Court of the United States and erroneously applied the doctrine of collateral estoppel to this case.

POINT II

THE PANEL DECISION DEPRIVES THE HEIMANNS OF THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL BY GIVING COLLATERAL ESTOPPEL EFFECT TO A DETERMINATION BY A STATE AGENCY ON AN ISSUE OF PRIVATE RIGHTS

The Heimanns argued in their main brief (p. 39) that to apply collateral estoppel based on the findings of the OCC in this case would deprive them of their right to a jury trial.

The right to a jury trial in federal court under the Seventh Amendment to the United States Constitution is a question of federal law in diversity cases. *Simler v. Conner*, 372 U.S. 221 (1963); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958); *See, Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988).

> Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved.

Simler v. Conner, supra at 222.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved.

Just last month, the Supreme Court repeated the standard by which it reviews attempts to limit the Seventh Amendment.

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, ___ U.S. ___, 58 U.S.L.W. 4345, 4346 (March 20, 1990), quoting from *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500, 501 (1959).

By application of what it calls the "public rights doctrine," the Supreme Court has consistently held that Congress may not constitutionally relegate a party to an administrative agency to enforce *private rights*.

> Our prior cases support administrative fact finding in only those situations involving "public rights," *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases as well are not at all implicated.

Atlas Roofing Co. v. Occupational Safety & Health Review Commission, 430 U.S. 442, 458 (1977). *See also, Hartman v. El Paso Natural Gas Co.*, 107 N.M. 679, 763 P.2d 1144, 1151 (1988) (confirming that in New Mexico, the OCC determines only "public rights" within the meaning of this doctrine; only the courts can determine "private rights.")

> [Congress] lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized

> in *Atlas Roofing*, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forbears. 430 U.S. at 457-458. The Constitution nowhere grants Congress such puissant authority.

Granfinanciera, S.A., v. Nordberg, ___ U.S. ___, 109 S.Ct. 2782, 2795 (1989).

Therefore, just as Congress cannot "eviscerate" the constitutional right to a jury trial by allowing administrative agencies to determine "private rights," neither could the New Mexico Legislature do so even assuming that such had been its intent in the Oil and Gas Act.

There can be no question that the Heimanns' claims for damages for breaches of their leases by Amoco, the lessee, involve only "private rights."

> State-law causes of action for breach of contract or warranty are paradigmatic of private rights.

Id. at 2798. *See also, Atlas Roofing, supra* at 458 (including "[w]holly private tort, contract and property cases" as involving only "private rights").

This case is far clearer that *Granfinanciera* and *Atlas Roofing* because here neither Congress nor the New Mexico Legislature has created a "statutory cause of action" which could be confused with the Heimanns' right to recover damages for Amoco's breach of its obligations under its leases. Nothing in the Oil and Gas Act gives the Heimanns a "cause of action," of any kind and, indeed,

the legislature referred those claiming damages from any statutory violations to the courts to obtain redress. § 70-2-29. NMSA 1978. Moreover, even if such had been its intent, the legislature could not have transformed the Heimanns' private rights into an administrative claim of some kind.

> Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Granfinanciera, supra, at 2800.

Legislative attempts to deprive parties of their right to adjudicate private rights in a jury trial will not be recognized, and the Seventh Amendment right will prevail over the legislation. In *Granfinanciera,* the Court held that a party's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a) was a private right and, therefore, the statute authorizing a legislative body to decide that issue could not deprive the party of his Seventh Amendment right to a jury trial. Therefore, just as legislation referring fraudulent conveyance claims to non-juries was held ineffective in *Granfinanciera,* so also any attempt by the New Mexico legislature to refer the Heimanns' contract claims to a non-jury tribunal would be ineffective to deprive them of their right to a jury trial on those claims.

This Court's decision in *Jacobs* rejecting the application of collateral estoppel to the very OCC ruling at issue here was presumably based on these principles, although the basis of its holding was unarticulated. The panel

decision in the case at bar, overruling *Jacobs*, constitutes an erroneous and highly dangerous precedent by permitting a decision by a state agency, acting in a non-judicial capacity, to conclusively determine and thereby preclude a claim over which a party has a right to a jury trial under the Seventh Amendment to the United States Constitution. Accordingly the Heimanns respectfully petition for rehearing and suggest that rehearing be en banc.

Respectfully submitted,

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APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 88-2070, 88-2072,
88-2255, 88-2355 (Consolidated)

AMOCO PRODUCTION COMPANY,

Plaintiff-Appellant and Cross-Appellee,

vs.

J. CASPER HEIMANN and OWAISSA HEIMANN, his wife; ROBERTA NELSON; BOBBY D. ADEE and JOHNANN ADEE, his wife; HOWARD W. ROBERTSON and PAULINE ROBERTSON, his wife; JOHNANN ADEE, as Trustee for Sharon Adee and Dowlen Adee; J. CASPER HEIMANN, as Trustee for Randall Lynn Heimann, deceased; Jay Dee Heimann, Gene Alvin Heimann and Russell Gary Heimann, PAULINE ROBERTSON, as Trustee for Van Howard Robertson; DEANA SHUGART, a married woman, dealing in her sole and separate estate; JOHNANN ADEE, as Personal Representative of the ESTATE OF FRED P. HEIMANN, Deceased,

Defendants-Appellees and Cross-Appellants.

PETITION FOR REHEARING
(Filed June 7, 1990)

The Defendants-Appellees above-named (hereinafter "the Heimanns") hereby petition for rehearing, pursuant to Rule 41, F.R.A.P., and 10th Cir. Rule 40, directed to the amended opinion filed in these consolidated appeals on May 24, 1990.

The sole issue presented in this Petition for Rehearing is whether the Court's opinion, expressly overruling *Amoco Production Co. v. Jacobs*, 746 F.2d 1394 (10th Cir. 1984), should be given retroactive or prospective effect.

INTRODUCTION

Whenever this Court overrules one of its prior decisions, it must also decide whether to give its new opinion retroactive or prospective effect. *Equal Employment Opportunity Commission v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984); *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984). Here, the Court did not expressly address this issue in its amended opinion, although it did implicitly hold that its decision would have retroactive effect and be applied to the parties before the Court. The Heimanns had no prior opportunity to address the retroactivity issue and, therefore, petition for rehearing on this ground.[1]

POINT I

APPLYING THE "OPERATIVE CONDUCT" STANDARD, THE COURT SHOULD GIVE PROSPECTIVE EFFECT TO ITS DECISION

In deciding whether to give a new rule of law retroactive or prospective effect, this Court has, in the past,

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[1] In the briefs filed on the merits of this appeal, Amoco Production Co. ("Amoco") did not request this Court to overrule the holding in *Jacobs* that the prior determination by the New Mexico Oil Conservation Commission was not binding on the parties in their action brought in federal court. *See*, Brief of the Appellant, pp. 35-42 and Amoco's Reply Brief, pp. 11-16. Accordingly, the Heimanns had neither the occasion nor the opportunity, prior to the Court's announcement of its decision overruling *Jacobs* on that point, to raise the issue of whether its decision should be given retroactive or prospective effect.

considered the three factors discussed in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[2] However, the Supreme Court of the United States has recently issued an opinion which frames this issue and the applicable standard in clearer focus. In *American Trucking Association, Inc. v. Smith*, No. 88-325 (June 4, 1990), the plurality of the Court affirmed the application of the three *Chevron* factors, and "distilled" those factors into the following standard:

> The principles underlying the Court's civil retroactivity doctrine can be distilled from both criminal and civil cases considering this issue. When the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law. See, *e.g. Chevron Oil*, 404 U.S. at 107. In order to protect such reliance interests, the Court first identifies and defines the operative conduct or events that would be affected by the new decision. *Lower courts* considering the applicability of the new decision to pending cases *are then instructed as follows: If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct.* If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply the new law.

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[2] Both this Court and the New Mexico Supreme Court have applied the three factors from *Chevron Oil Co. v. Huson, supra*, in deciding whether a decision overruling prior case law will be given retroactive effect. *Whenry v. Whenry*, 98 N.M. 737, 652 P.2d 1188 (1982).

Id., slip opinion at 21 (all references to *American Trucking* are to the plurality opinion). (Emphasis added).

The "law-changing decision" in this case is, of course, this Court's amended opinion of May 24, 1990, and, specifically, the following holding from that opinion:

> Therefore, we hold that where a state administrative agency, empowered to rule on the fairness of a unitization plan and entitled to full faith credit by a federal court, finds that a proposed unitization adequately protects the correlative rights of all interested parties, said approval is conclusive on the issue of good faith. To the extent that *Jacobs* holds to the contrary, it is overruled. [Footnote reciting circulation of the opinion among all active judges of the court omitted].

Amoco Production Co. v. Heimann, amended opinion, pp. 16-17.

The first step in applying this standard is to identify and define the "operative conduct or events that would be affected by the new decision." Here, the "operative conduct or events" consist of (1) a mineral lease containing a "unitization clause" such as that in this case, the *Jacobs* case or *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 933 (10th Cir. 1954), (2) the lessee's application to a properly-empowered agency such as the New Mexico Oil Conservation Commission for approval of a proposed unit combining a lessor's lands with other lands, (3) the agency's approval of that application based on a determination that the unitization adequately protects correlative rights, (4) a subsequent claim raised by a lessor in a judicial proceeding that the proposed unit constitutes or is the result of a breach of the lessee's duty of good faith

to the lessor, and (5) the lessee's inclusion of the lessor's lands within the unit based on its position that the agency approval resolved any issue of its good faith to the lessor. That conduct and those events, particularly the litigation, would necessarily be "affected" by this Court's decision on collateral estoppel.

Finally, if the operative conduct or events occurred *before* the law-changing decision, as here, "a court should apply the law prevailing at the time of the conduct." *American Trucking, supra,* slip opinion at 21. Here, all of the operative conduct or events occurred before the law-changing decision. Therefore, under this standard, the law to be applied is the law in effect before the law-changing decision which, in this case, is the law as announced by this Court in *Jacobs*.

Accordingly, applying the "operative conduct" standard, this Court's amended opinion should be given prospective effect.

This result comports with both the letter and spirit of *American Trucking*. Distilled to its essence, the Court's refusal to apply a new decision to the parties before it "is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law." *American Trucking, supra,* slip opinion, p. 21. Here, the Heimanns relied on this Court's holding in *Jacobs* to the effect that the federal courts would hear their claims regardless of the approval of the OCC. Judge Burciaga followed this Court's holding in *Jacobs*. Amoco ignored the *Jacobs* decision and subjected the Heimanns lands to the unit based on the OCC approval.

Of course, this Court always has the power and, indeed, the duty to overrule one of its prior opinions whenever it concludes that it does not correctly state the law. However, the rationale of all of the Supreme Court's prior decisions on retroactivity, we submit, is that litigants should be entitled to rely on decisions of the federal courts unless and *until* they are overturned. For this reason, the Supreme Court's recent statement of these principles in *American Trucking* has refined the *Chevron* factors into a simple rule of applying a decision which overrules prior case law to future conduct and events and applying prior law to past conduct and events. To apply new law to past conduct and events merely punishes those, like the Heimanns, who justifiably believed that they were entitled and required to rely on the opinions of the federal courts unless and until they are overruled. New law is given prospective effect precisely to avoid the "harsh and disruptive effect on those who relied on prior law." *American Trucking, supra,* p. 21.

POINT II

APPLYING THE CHEVRON FACTORS, THE COURT SHOULD GIVE PROSPECTIVE EFFECT TO ITS DECISION

The same result obtains if the "undistilled" *Chevron* factors are applied. Those factors are as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past percedent [sic] on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, . . . Second, it has been stressed that "we must . . . weigh the

> merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."

Chevron Oil, supra at 106-107.

These are factors to be considered on the issue of retroactivity; they are not requirements. Each factor need not compel prospective application. *Mitchell v. Mobil Oil Corporation*, 896 F.2d 463, 470 (10th Cir. 1990); *Jones v. Consolidated Freightways Corp. of Delaware*, 776 F.2d 1458, 1460 (10th Cir. 1985).

The first factor weighs in favor or prospectively. This first factor is often stated as "a clear break with precedent." *Jones v. Consolidated Freightways Corp. of Delaware, supra*, at 1463. *See also, American Trucking, supra*, at slip op. p. 14 ("clear break from prior precedent"); *Derstein v. Van Buren, supra*, at 656 (" 'clean break' with 'past precedent' "); *Jackson v. City of Bloomfield, supra*, at 654 ("clear break with prior decisions"). The amended opinion expressly overrules the *Jacobs* decision on the issue of whether the approval of the OCC is conclusive on the issue of good faith. The Court expressly circulated the opinion of the panel to all the judges of the Court in regular active service "because this panel opinion overrules Tenth Circuit precedent." Amended Opinion, p. 17, n. 8. That is customary when this Court overrules prior

precedent and considers the prospective or retroactive effect of its new decision. *See, Derstein v. Van Buren*, 828 F.2d 653, 656, n.** (10th Cir. 1987); *E.E.O.C. v. Gaddis, supra*, at 1377, n. 3.

The second factor consists of weighing the merits and demerits of whether retrospective operation will further or retard the purpose and effect of the rule in question. This Court has given prospective effect to its new decisions even where this factor would, by itself, weigh against prospectivity but the equities weigh in favor or prospectivity, *Jones v. Consolidated Freightways Corp. of Delaware*, or where this factor is neutral. *Jackson v. City of Bloomfield, supra*. Sometimes, the second factor is considered part of, and discussed with, the third factor. *See, Derstein v. Van Buren, supra; E.E.O.C. v. Gaddis, supra*. In *American Trucking*, the Court applied the second factor as follows:

> [T]he HUE tax was entirely consistent with the *Aero Mayflower* line of cases and it is not the purpose of the Commerce Clause to prevent legitimate state taxation of interstate commerce.

Id., at 11.

In other words the "purpose" factor weighed in favor of prospectivity because (1) the rejection of the Commerce Clause claim and upholding the HUE tax was consistent with prior case law and (2) the purpose of the Commerce Clause is not to prevent states from imposing legitimate taxation in interstate commerce. Similarly in this case, this factor weights in favor of prospectivity because (1) the trial court's rejection of Amoco's collateral estoppel claim was entirely consistent with prior case law and (2)

the purpose of collateral estoppel is not to prevent legitimate litigation. The interests of promoting judicial economy, while supporting this Court's new ruling on collateral estoppel (Amended Opinion, p. 28), can be fully achieved and will not be impaired by prospective application, since the trial of the Heimanns' claims has already occurred and future cases will fall under the new rule.

Finally, the third factor requires this Court to "weigh the inequity imposed by retroactive application." *Chevron Oil, supra,* at 107. First, consider the Heimanns' side of the scales. This Court's decision in *Jacobs* was announced on October 10, 1984. One month earlier, Amoco had sued the Heimanns seeking a determination by the lower court that the Heimanns' mineral lands were included in its Bravo Dome Unit. The Heimanns understandably looked at this Court's decision in *Jacobs* for a conclusive statement of the law. This Court said that Amoco had a duty of good faith to the Heimanns and went to some length to define that duty. The Heimanns measured Amoco's conduct against the standard of good faith announced by this Court and concluded that Amoco had breached it duty of good faith. On the subject of the OCC approval, this Court said:

> The fact that the receipt of the blessing of the Oil Commission does not in and of itself result in the conclusion that [the unit agreement] was valid . . . The Commission cannot by its approval establish that the area is fair to the owners of interest therein.

Jacobs, supra, at 1403.

Therefore, the Heimanns relied on this Court's statement that the OCC approval did not establish that the

unit was "fair to the owners of interest therein." Based on this Court's decision, the Heimanns felt that their rights had been violated and that they had an appropriate forum in federal court to enforce their rights. Beginning in April of 1984, and continuing after the announcement of the *Jacobs* decision and after it had sued the Heimanns, Amoco treated the Heimanns lands as if they were in the unit and paid them for approximately one-third of the actual production under their lands.

Relying almost exclusively on this Court's decision, the Heimanns "took on" Amoco Production Co. to litigate their claims. Sustained by this Court's decision, the Heimanns engaged in the *extensive* discovery, fact investigation, witness location and interviews, legal research, and trial preparation which always occur with entities of that magnitude. Judge Burciaga encouraged the Heimanns along the way by relying on this Court's "clear support" in *Jacobs* that the OCC did not decide the issue of good faith. (*See*, Memorandum Opinion and Order of August 27, 1986, attached hereto as Exhibit "A," pp. 6-7 [omitted from this Reply to Brief in Opposition]). This Court, in its amended opinion, recognized that Judge Burciaga "understandably relied" on *Jacobs*. (See also, *id.* at 14 "[w]e understand how the district court, relying upon the equivocal language in *Jacobs, reasonably* could conclude that its Instruction No. 18 correctly stated the lessee's duty of good faith, . . . ") (Emphasis added). The Heimanns' claims were thus presented to and decided by a jury after a lengthy and fair trial, resulting in a verdict in their favor. Judge Burciaga independently decided the equitable issues in the Heimanns' favor.

After trial, Amoco appealed, and the Heimanns were confident of their position before this Court. They had a

very recent decision of this Court deciding in their favor all of the issues Amoco raised. Although this Court can and occasionally does overrule its prior decisions, it does not often do so and it even less frequently overrules a decision so recent in the absence of some significant intervening decision directly in point from a controlling jurisdiction. Continuing to rely on *Jacobs*, therefore, the Heimanns engaged in the lengthy and expensive process of the appeal.

Now, in May of 1990, this Court has determined that when it decided the *Jacobs* case, it "overlooked" pertinent law, "igonred" the proper deference owed to state administrative agencies, and was "inaccurate" in its description of the OCC approval as a mere blessing. Amended Opinion, p. 16. Of course, as stated earlier, this Court has the power and the duty to say it was wrong whenever it so determines. However, this Court can fully rectify the problems it finds in the *Jacobs* decision by giving prospective effect to its amended opinion. But given the history of this case, which was built on this Court's decision in *Jacobs*, surely this is a case where the retroactive application of the Court's new decision to the Heimanns would produce "substantial inequitable results" and "injustice or hardship." The very heart of the *Chevron Oil* and *American Trucking* line of cases is that whenever a court overrules one of its prior cases, it must not punish those who obviously relied very heavily on its prior decision.

The inequity to the Heimanns by denying prospective application far outweighs any inequity to Amoco in granting it. Even if this opinion is given propsective [sic] application, Amoco will have achieved a major victory. It will be virtually free from all claims by other lessors that

unitization projects approved by the OCC or similarly empowered agencies in other jurisdictions constitute or result from an alleged breach of Amoco's duty of good faith. Its newly-defined duty of good faith, which may arise before these agencies, will not require factual demonstrations as to individual lessors but may be met with an overall presentation that the project protects correlative rights. Surely, the efficiencies obtained as a result of this Court's decision will result in substantial economic advantages to Amoco which may well offset the cost to Amoco of prospective application of this decision. Moreover, there is nothing inequitable about applying Amoco's conduct, as found by the court and the jury, to this Court's legal standards as announced in *Jacobs* unless and until that decision is overruled by this Court

Therefore, The [sic] third *Chevron* factor must also be held to support prospective application.

CONCLUSION

Whether this Court applies the three *Chevron* factors or the new distilled standard contained in *American Trucking* based on the temporal relation of the "operative conduct and events" to the law-changing decision, the result is that prospective application will (1) accomplish this Court's purpose in rectifying its own prior analysis which it finds to have been erroneous, (2) still produce a result which will be highly favorable to Amoco by freeing it of future good faith claims from lessors once it has obtained OCC approval of its projects, and (3) avoid inflicting a severe injustice and hardship on these people who believed that they could rely on these reasons, the

Heimanns respectfully ask this Court to grant this Petition for Rehearing and to give its amended opinion prospective application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I did, on the 6th day of June, 1990, cause to be hand-delivered a true and correct copy of the foregoing document to Michael B. Campbell, Esq., Campbell & Black, P.A., Jefferson Place, Suite 1, 110 North Guadalupe, Santa Fe, New Mexico 87501.

By /s/ Steven L. Tucker
STEVEN L. TUCKER